No. 88-325

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM 1988

AMERICAN TRUCKING ASSOCIATIONS,
INC., et al.,
PETITIONERS

v.

MAURICE SMITH, DIRECTOR,
ARKANSAS HIGHWAY
AND TRANSPORTATION DEPARTMENT, et al.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

BRIEF OF THE AMICI CURIAE STATES OF PENNSYLVANIA, ALASKA, COLORADO, INDIANA, MARYLAND, MINNESOTA, NEBRASKA, NEVADA, RHODE ISLAND, AND WYOMING IN SUPPORT OF RESPONDENTS

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NEBRASKA, NEVADA, RHODE ISLAND,
AND WYOMING
IN SUPPORT OF RESPONDENTS**

Pursuant to Rule 36 of the rules of this Court, the Commonwealth of Pennsylvania, by its Attorney General, and the

amici states by their Attorneys General respectfully submit this Brief as amici curiae in support of Respondents.

INTEREST OF THE AMICUS CURIAE

In Am. Trucking Ass'ns v. Scheiner, No. 86-357, slip op. (U.S. June 23, 1987), the Court held unconstitutional certain highway user fees imposed by states on motor carriers. These fees were dedicated specifically to fund transportation facilities and were invalidated for not being proportional to the services rendered by the State. This case presents the question, left open in Scheiner, of whether the rule announced in Scheiner should apply retroactively, so as to require the refund of all taxes already collected,

or should apply prospectively only.[1]

Pennsylvania and some of the amici States imposed and collected taxes that are now invalid under the rule announced in Scheiner. Other amici States join in this brief to insure a proper review of the principles involved in litigating refund issues under Chevron v. Huson, infra. Amici States with highway user

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[1]The highway user fees invalidated in Scheiner were imposed by Pennsylvania. The Court, recognizing that the retroactivity issue was a substantial one, remanded the case for consideration of that issue. Scheiner, No. 86-357, slip op. at 30, (U.S. June 23, 1987). The case is now pending in the Supreme Court of Pennsylvania, and its outcome will likely be affected by the Court's disposition of ATA's first challenge in this case.

fees face the prospect of massive liability if Scheiner is applied retroactively. Pennsylvania estimates that its liability alone will be $370 million plus interest; collectively, the other amici states imposing highway user fees estimate their liability at about $350 million plus interest.[2] Payouts of this magnitude would cripple the ability of the amici States to maintain and improve the highways and bridges on which commerce depends.

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[2]Arkansas' estimated potential liability is $160,000,000 in tax plus appropriate interest. Indiana's potential liability was $60,000,000 in tax plus interest. (Indiana settled their refunds claims with the trucking industry by entering into a stipulation applying Scheiner prospectively only, which required a refund of tax and interest in the amount of 2.6 million dollars.) Kentucky's estimated potential liability is $59,000,000 in tax

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plus appropriate interest. New Jersey's estimated potential liability is $34,000,000. Vermont's potential liability is $7,900,000 in tax plus interest. Maryland's estimated potential liability was $34,000,000. Maryland's liability was settled by a final decision of the Maryland Court of Appeals, Am. Trucking Ass'ns v. Goldstein, 541 A.2d 955, 957 (1988), which applied Scheiner prospectively only.

SUMMARY OF THE ARGUMENT

Scheiner should apply prospectively only. Scheiner broke with 70 years of clear precedent, which had upheld highway user fees and which the Court had cited with apparent approval as recently as 1981. Congress, too, had recently surveyed the field of highway user fees, but had given no hint that it thought these flat taxes constitutionally infirm. In imposing such taxes, Pennsylvania and other states relied on this settled view of the law; they should not now be punished for failing to predict that it would be overturned.

Nor is retroactive application necessary in order to vindicate the Commerce Clause values that underlie

Scheiner. The Commerce Clause's purpose is to prevent interstate barriers to the free flow of commerce. Scheiner has removed those barriers for the future, and whatever commerce did not flow in the past cannot be affected now.

On the other hand, the inequities of retroactive application are patent. The taxes the states collected were dedicated to the construction, repair and maintenance of highways and bridges. The states cannot sell these improvements or give them to petitioners to satisfy their demands. Nor can the petitioners now return to the states the value they received from these improvements in the form of new bridges, shorter and better routes, and less wear and tear on their vehicles.

The petitioners have secured a substantial benefit by ridding themselves of highway user fees for the future. But every factor germane to the question counsels against giving them retroactive relief as well.

ARGUMENT

I. The Court's Decision In ATA v. Scheiner Should Be Applied Only Prospectively Because It Overruled Clear Precedent Upon Which The State Of Arkansas And Six Other States, Including Pennsylvania, Relied, Because Prospective Application Fully Serves Commerce Clause Policies, And Because It Would Be Unfair To Order Massive Refunds Where The Monies Collected Have Been Devoted To Road Improvements Of Which Motor Carriers Have Taken Advantage.

In its remand of Scheiner and Am. Trucking Ass'ns v. Gray, No. 86-358 memo. op., judg. vacated and remanded (U.S. June 26, 1987) (now Am. Trucking Ass'ns v. Smith, No. 88-325), the Court left open the question whether its ruling in Scheiner should be applied retroactively.[3] As described below, well

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[3]The case now before the Court also presents the question of whether Arkansas should be compelled to refund

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settled rules for judging whether the decision should be applied to past completed transactions mandate that the decision be given only prospective effect.

The Constitution is neutral on the question of whether court decisions should be applied prospectively or retroactively. Great Northern R.R. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358,364 (1932). On many occasions, the Court has held that a particular ruling

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flat highway user fees that were collected after the date Scheiner was announced. The amici States take no position on this question, although it is important to note that Pennsylvania stopped collecting its two highway user fees and refunded all taxes received on or after the date Scheiner was decided, June 23, 1987.

should be applied only to events occurring after its decision. See e.g., Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 87-89, 91 (1982); Buckley v. Valeo, 424 U.S. 1, 142-143 (1976) (per curiam); Chevron Oil Co. v. Huson, 404 U.S. 97, 108-109 (1971).[4]

There is no justification for a sweeping rule of retroactive application. Prior decisions may have consequences which cannot be justly ignored. The

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[4]These cases refute petitioners' argument that, as between two litigants, the one who "guessed wrong" about the law should always bear the "burden of surprise." Br. for Pet., p. 15. If this were really so, all decisions would always apply retroactively, and there would be no need for retroactivity analysis at all. Petitioners' argument simply begs the question.

past cannot always be erased by a new judicial declaration." Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940). In each case, the Court must first determine whether the new decision was a clear break with prior precedent; if so, the decision on prospectivity is governed by an examination of the history, purpose and effect of the new rule, as well as the inequity and disruption that would be imposed by its retroactive application. Chevron Oil Co., supra, 404 U.S. at 106-107.[5]

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[5]These considerations parallel those canvassed by the courts in determining whether, and to what extent, to employ equitable remedies at their disposal. See Lemon v. Kurtzman, 411 U.S. 192, 198 - 203 (1973).

Petitioners, however, ask the Court not to apply Chevron to this case at all, but rather to adopt a per se rule that Chevron is unavailable to litigants that happen to be units of government. Br. for Pet., p. 10-12. To support this remarkable request, petitioners rely heavily on Owen v. City of Independence, 445 U.S. 622 (1980). But Owen has little relevance here.

Owen is, at bottom, a statutory construction case; it addresses the important but narrow question of whether Congress intended municipalities to enjoy any degree of immunity in actions brought under 42 U.S.C. §1983. Owen, supra, 445 U.S. at 635 ("question . . . is essentially one of statutory construction"). The decision in Owen

thus rests, not on broad principles of constitutional law or public policy, but on features of legislative and legal history that illuminate the intent of the 19th-century Congress that enacted Section 1983. Id. at 636-56. This case, on the other hand, is governed not by the intent of Congress in 1871, but by the Court's own standards, laid down in Chevron, on how best and most fairly to apply its own decisions. On this issue, Owen has little to say.

Moreover, petitioners' mechanical application of Owen to deny the benefit of Chevron to a single class of litigants--government units--ignores the important differences between Section 1983 actions and Chevron-type situations. Section 1983 itself singles

out government units; indeed, Section 1983 exists solely to provide a remedy against government units and their agents, and when Owen is applied in such an action it does no more than further the remedial purpose of the statute. Chevron, on the other hand, is a neutral principle of decision-making, which applies to all litigants alike, and whose touchstones are considerations of fairness and equity. It would be anomalous indeed to exclude a single class of litigants from the benefits of such a rule and in fact, the Court has declined to do so. The Court has, in a number of cases, applied its rulings prospectively only in order to avoid injustice or inequitable administrative and financial hardships on state and local governments. Florida v. Long, No. 86-1685, slip op. at 11 (U.S. June 22, 1988); Lemon v. Kurtzman, 411 U.S. 192,

198-199 (1973); Cipriano v. City of Houma, 395 U.S. 701, 706 (1969). We proceed, then, to consider the proper application of Chevron to this case.

A. This Court's Decision In Scheiner, Which Invalidated Flat Fees on Motor Carriers Imposed Solely For the Use Of State Highways, Was A Clear Break With Precedent, Which Was Not Foreseeable Under The Chevron Test.

The Court's decision in Scheiner clearly established a new principle of law, which amounts to a clear break with past precedent. Despite ten prior approvals of non-mileage related highway user fees expended solely for transportation facilities,[6] the Court held in

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[6]Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950) (highway user fee based on fair market value of motor vehicles); Aero Mayflower Transit Co. v.

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Scheiner that " . . . precedents upholding flat taxes can no longer support the broad proposition . . . that

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Bd. of R.R. Comm'rs, of State of Montana, 332 U.S. 495 (1947) (flat highway user fee imposed on motor carriers); Clark v. Paul Gray, Inc., 306 U.S. 583 (1939) (flat highway user fee imposed on certain motor vehicles); Dixie Ohio Express v. State Revenue Comm'n of Georgia, 306 U.S. 72 (1938) (highway user fee based on manufacturer's rated capacity); Morf v. Bingaman, 298 U.S. 407 (1936) (flat highway user fees imposed on motor vehicles); Aero Mayflower Transit Co., v. Georgia Pub. Serv. Com'n, 295 U.S. 285 (1935) (flat highway user fee imposed on motor carriers); Hicklin v. Coney, 290 U.S. 169 (1933) (highway user fee based on carrying capacity); Clark v. Poor, 274 U.S. 554 (1927) (highway user fee based on carrying capacity); Kane v. New Jersey, 242 U.S. 160 (1916) (highway user fee based on horsepower); Hendrick v. Maryland, 235 U.S. 610 (1916) (highway user fee based on horsepower).

every flat tax for the privilege of using a state's highway must be upheld." Scheiner, No. 86-357, slip op. at 28, (U.S. June 23, 1987). Scheiner's newly announced requirement that specifically dedicated highway user fees must be proportional created a potential liability of nearly $1 billion to the seven states that had imposed highway user fees as a component of their highway taxation schemes.[7]

This break with the past was not clearly foreshadowed. To the contrary, cases upholding flat highway user fees had been cited with apparent approval in five cases, decided as recently as 1981. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 621-622 (1981); Massachusetts v. United States, 435 U.S.

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[7]See Footnote 2.

444, 463-464 (1978); Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707, 714-716 (1972). Even Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 278 n.6, (1977), and Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602, 607 n. 4 (1951), upon which the petitioners place so much reliance, cite flat fee cases with approval.

Petitioners seek to avoid prospective-only application of Scheiner by shrouding Scheiner's new rule of proportionality for user fees in discussion of the change in the law regarding general revenue taxes brought about by Complete Auto Transit, Inc. v. Brady, supra. That the constitutional law relevant to user fees has evolved on

a track distinct from the track on which the law has evolved relevant to general revenue taxes is clearly apparent in the Court's decision in Commonwealth Edison Co. v. Montana, 453 U.S. 609, 621-622 & n. 12 (1981):

> The Montana Supreme Court held that the coal severance tax is 'imposed for the general support of the government' . ., and we have no reason to question this characterization of the Montana tax as a general revenue tax. Consequently, in reviewing appellants' contentions, we put to one side those cases in which the Court reviewed challenges to "user" fees or "taxes" that were designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services. See, e.g., Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972); Clark v. Paul Gray, Inc., 306 U.S. 583 (1939); Ingels v. Morf, 300 U.S. 290 (1937)[12]

[12]As the Court has stated, "such imposition, although termed as tax, cannot be tested by standards which generally determine the validity of taxes." Interstate Transit, Inc. v. Lindsey, 283 U.S. 183, 190 (1931). . . . (emphasis added)

Each of the decisions cited in the foregoing passage concerned a user fee imposed on transportation. The flat tax decisions elaborated a set of applicable considerations different from those applied to general revenue taxes, reflecting the different nature of user fees.[8]

[8]Paul J. Hartman, "Chapter 12, Exactions for the Use of Public Facilities," Federal Limitations on State and Local Taxation. Lawyer's Cooperative Publishing Co., 1981, pp. 665-666.

This Court's most recent pre-Scheiner user fee decision, which post-dated Complete Auto Transit, supra, relied extensively on the earlier flat tax decisions in evaluating the validity of the fees under challenge, and did not cite a single general revenue decision as pertinent to that analysis. Massachusetts v. United States, supra, 435 U.S. at 463-467. Simply stated, not a single decision of this Court prior to Scheiner in any way undercut the vitality of the user fee decisions.

It is significant that not one member of Pennsylvania's Supreme Court foresaw the possibility that the Court would overrule over 70 years of highway user fee precedents. Perhaps this is

the reason that the majority of this Court expressed no disagreement with the statement of Justice O'Connor in dissent that "Pennsylvania . . . had every reason to rely upon the settled understanding that highway taxes reasonably related to the benefit conferred do not violate the Commerce Clause." Scheiner, No. 86-357, slip op. at 3, (U.S. June 23, 1987).

Exercising its authority under the Commerce Clause, Congress in recent years has repeatedly visited the area of state taxation of motor carriers, in order to prevent discrimination against interstate commerce. In the Motor Carrier Act of 1980, Congress outlawed a particular form of state taxation, which

it determined unreasonably burdened interstate commerce.[9] The Act prohibited certain state taxes on motor carrier property, but left intact other forms of state taxation, including highway user fees on motor carriers.[10] Indeed, the legislative history of the Act makes clear that Congress consciously determined not to place any restrictions at that time on state highway user fees.[11] In 1984, Congress increased the federal flat weight-based user fee charges on trucks,[12] citing problems

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[9] See 49 U.S.C. §11503a

[10] See 49 U.S.C. §10521(b)(4)

[11] H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. (1980)

[12] 26 U.S.C. §4481(a)

and expenses relating to feasibility and administrative costs of alternative taxing schemes,[13] which were much the same problems that motivated the states to adopt similar fees. Congress also has conducted numerous hearings in recent years on the issue of state taxation of motor carriers,[14] none of which has resulted in the outlawing of states' highway user fees.

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[13]Report to Congress: Alternatives to Tax the Use of Heavy Trucks, V-3 (1984) by the U.S. Department of Transportation, Federal Highway Administration

[14]Oversight of the Motor Carrier Act of 1980: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation, 98th Cong., 1st Sess. (1983); Surface Transportation Issues: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation, 94th Cong., 2d Sess (1984).

In their effort to characterize the new rule announced in Scheiner as foreseeable, petitioners "suggest that Aero Mayflower stood alone in 1983 as authority in support of the constitutionality of flat user fees. Br. for Pet., p. 21. Petitioners' suggestion, of course, conveniently ignores nine other binding flat fee precedents,[15] three additional explicit approvals of prevailing flat fee analysis,[16] and at least two other tacit approvals of flat fees.[17] In

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[15]See Footnote 6

[16]Commonwealth Edison Co. v. Montana, supra, 453 U.S. at 621-622 & n. 12; Massachusetts v. United States, supra, 435 U.S. at 463-469; Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., supra, 405 U.S. at 714-716.

[17]Complete Auto Transit, Inc. v. Brady, supra, 430 U.S. at 278 n. 6; Spector Motor Service, Inc. v. O'Connor, supra, 340 U.S. at 607 n. 4

light of Congress' refusal, after review, to prohibit highway user fees,[18] state legislatures were clearly justified in relying upon the extensive body of Commerce Clause precedent supporting the constitutionality of such fees, and could not possibly be expected to have foreseen their invalidation in Scheiner.

For all these reasons, the decision in Scheiner was a clear break with past precedent, which was not foreseeable and which thus requires a further examination of the criteria prescribed in Chevron to determine whether retroactive application of Scheiner is required.

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[18]See Footnote 10

B. Prospective Application of Scheiner Will Further Commerce Clause Policies.

The Court noted in Scheiner that the basic purpose of the Commerce Clause is to prohibit the multiplication of preferential trade areas destructive of free commerce anticipated by the Constitution. Scheiner, No. 86-357, slip op. at 13, 14, (U.S. June 23, 1987). This purpose, which was held to be offended by non-mileage related highway user fees, can be effectuated fully by prospective application of the Scheiner decision in this case. Flat fees now have been eliminated, and barriers to free trade have been removed. There is no longer a danger that free trade will be hindered by the adoption of flat fees by each of the fifty states. Commerce now may flow

unimpeded by these improper disincentives to travel through states like Pennsylvania and Arkansas, which had imposed highway user fees as part of their overall highway taxation schemes. A refund, on the other hand, would do nothing to further advance these purposes.[19]

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[19]Petitioners' claim that prospective application of Scheiner will cause irreparable injury to the trucking industry while undermining the purpose of the Commerce Clause, (Br. for Pet., p. 24-29) is quite inconsistent with petitioners' selective pursuit of retroactive relief in the states that employ flat fees. Although petitioners are actively asserting retroactive application of Scheiner in Arkansas, Pennsylvania, Kentucky, New Jersey, and Vermont, similar claims by petitioners were withdrawn by stipulation in Indiana and abandoned at the trial court level in Maryland. See Footnote 2.

This is not to say that governments are free with impunity to levy obviously illegal taxes knowing that, at worst, they will be told to stop, but not to return the revenue. Petitioners' invocation of the spectre of States enacting one such tax after another, Br. for Pet. p. 26-28, ignores the Court's repeated observation that state legislators swear an oath to support the Constitution, U.S. Const., Art. VI, §3; see, e.g., Rostker v. Goldberg, 453 U.S. 57, 64 (1981), and ignores the Court's consequent "reluctance to attribute unconstitutional motives to the States." Mueller v. Allen, 463 U.S. 388, 394 (1983). Even more important, petitioners' argument ignores the fact that such efforts by the States would be unavailing in any event. The non-retroactivity doctrine of Chevron comes

into play only when, as a threshold matter, there has been a clear break with past precedent. A series of illegal taxes, which differed from each other only marginally would by definition not be eligible for non-retroactive treatment.[20]

C. Retroactive Application of the New Rule of Law Announced In Scheiner Would Produce Substantial Inequitable Results.

Retroactive application of the new rule announced in Scheiner would produce "substantial inequitable results." Cipriano v. City of Houma, 395 U.S. 701,

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[20]There is also little chance that a ruling in favor of prospectivity here will discourage Commerce Clause challenges in the future. Commercial enterprises such as those of petitioners have a substantial incentive to litigate these questions (even for only a prospective victory), and the circumstances here are significantly extraordinary to make it unlikely that others will be dissuaded from filing suit.

706 (1969) (per curiam). The states of Arkansas and Pennsylvania, along with five other states, justifiably relied on at least fifteen precedents in this Court in deciding to employ specifically dedicated highway user fees as a component of their highway taxation schemes. The revenues that were raised were dedicated specifically to the repair and maintenance of bridges and highways upon which the motor carriers traveled; and the funds collected have already been devoted to such repair and reconstruction of hundreds of deteriorated bridges and highways.

The affected states cannot turn back the clock on these projects and simply return the money previously collected. The funds have paid for repair and replacement of deteriorating transportation facilities that had been damaged

in part by the increasingly heavy interstate motor vehicles upon which the fees were imposed. The benefits to these carriers are clear and substantial since replacement and repair of roads and bridges provided them with safer and less time-consuming routes.

At the time these user fees were imposed, binding precedent held that fees specifically dedicated for construction of transportation facilities were constitutional as long as they were facially nondiscriminatory and not excessive when compared to the benefit conferred by the taxing state.[21] Until

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[21] See Clark v. Paul Gray, Inc., supra, 306 U.S. at 599, Commonwealth Edison Co. v. Montana, supra, 453 U.S. at 621-622 & n. 12; and Paul J. Hartman "Chapter 12, Exactions for the Use of Public Facilities", Federal Limitations on State and Local Taxation. Lawyers Cooperative Publishing Co., 1981, p. 665-666.

the Scheiner decision, no one, including not a single member of the Pennsylvania Supreme Court, had reason to believe otherwise.

Equity does not direct that the petitioners be afforded a refund. A prospective application of the new rule announced in Scheiner does not leave the truckers with a hollow victory. They retain the substantial advantage of having secured a ruling that bars future collection of these, or any other, non-mileage related highway user fees, despite Congress' refusal to bar such fees. They also have enjoyed, and will continue to enjoy for many years to come, the substantial improvement of highways and bridges in Pennsylvania, Arkansas, and other states, which have been realized only in part by fees charged on the trucking industry.

The refund that petitioners seek would have the grossly unfair effect of allowing them to enjoy these benefits without having contributed anything toward their cost. Petitioners imply that refunds are appropriate because they pay other taxes. Br. for Pet., p. 9. Such reasoning, however, would allow the trucking industry to avoid contributing any additional taxes towards the replacement of bridges and highways necessitated particularly by the heavy loads carried by interstate motor carriers.[22] Meanwhile, refunds on the

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[22]Granting refunds in these circumstances is particularly inappropriate given the fact that had the States foreseen the new principle in Scheiner, they could have imposed a more

(FOOTNOTE CONTINUED ON NEXT PAGE)

order of $160,000,000 and $370,000,000 respectively would severely impair Arkansas' and Pennsylvania's future highway and bridge programs.

(FOOTNOTE CONTINUED)

finely calibrated third structure tax (for example, a weight distance tax), which would meet the proportionality requirement of Scheiner and which would have recompensed the States for the additional highway costs necessitated by heavy interstate motor vehicles.

CONCLUSION

For the reasons set forth above, the judgment of the Supreme Court of Arkansas should be affirmed insofar as it refuses to apply Scheiner retroactively.

Respectfully submitted,

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